Filed 1/6/09 In re L.S. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re L.S., a Person Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. ANTHONY S., Defendant and Appellant.	G040496 (Super. Ct. No. DP016679) O P I N I O N

Appeal from orders of the Superior Court of Orange County, James Patrick Marion, Judge. Affirmed.

Linda Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

Benjamin P. de Mayo, County Counsel, Karen L. Christensen and Debbie Torrez, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minor.

Anthony S., father of 16-year-old L.S., appeals from the juvenile court's jurisdictional findings and the order denying his request for reconsideration. He contends there was insufficient evidence to sustain a petition under Welfare and Institutions Code section 300, subdivisions (b) and (g) (all statutory references are to this code unless otherwise noted) and that the court should have dismissed that petition and declared L.S. a ward of the court under section 601. We find no error and affirm.

FACTS AND PROCEDURAL BACKGROUND

Orange County Social Services Agency (SSA) took the child into protective custody in February 2008 due to "caretaker absence." The child stated father had kicked her out of his home the previous September and that she did not want to return because he had sexually assaulted her when she was in the third grade. She and her almost 18-year-old boyfriend had been living with "some other adults" who no longer wanted to care for them and had asked them to move out.

Father told the social worker the child had behavioral problems, including an explosive temper, violent behavior, and chronic running away. For three months in 2007, the child and her sister lived with their mother but returned to father's home because mother was violent and hot tempered. Following an argument in September 2007, father told the child to leave the home until she cooled off. She left and refused to return home, threatening to run away again if father forced her. Father tried sending her to youth shelters and other family members for help but they were unsuccessful. He believed he had tried everything and did not know what to do anymore. Due to her behavior, he could no longer care for her in his home. But he believed she needed help and "would be safer at Orangewood Child[ren]'s Home [rather] th[a]n running the streets with her boyfriend."

Mother also refused to have her placed in her care, claiming the child did not want help and would not stay in the home. She feared the child would ruin things for her other children and would consider taking her back only if she decided on her own to get counseling.

SSA filed a dependency petition for failure to protect and failure to provide support. (§ 300, subds. (b), (g).) The court detained the child and authorized visitation for her parents, but the child requested no contact with either.

At the jurisdictional hearing in April, the court accepted into evidence two SSA reports. The social worker opined "neither parent had the capacity to protect the child due to numerous factors. . . . Both parents admit that they are unwilling to assume custody of the child at this time due to her acting out behaviors, such as running away, disrespect towards adults, violent outbursts, and prior assaultive behavior. Furthermore, . . . mother and father have no desire to have contact with each other and tend to blame one another for the child's issues." It was also his opinion that although both parents were employed and had the necessary means to provide for the child, the fact neither was "'willing' to take [her] at this time[] support[ed] the [failure to provide support] allegation."

The social worker reported the allegations of past sexual abuse were inconclusive due to the child's history of making statements and later retracting them. But he believed mother's history of verbal and physical abuse was substantiated by her own admission and reports from the child.

Neither parent attended the jurisdictional hearing. No witnesses were called and no evidence was presented apart from SSA's two reports. Father's counsel argued the allegations under section 300, subdivision (b) were superfluous because they "don't rise to a level of establishing a substantial risk of serious physical harm to the child and . . . the case is more properly pled under [section 300, subdivision (g).] [¶] The essence of the case . . . is the parents' unwillingness or ability to care for this child. And I

think the Legislature has contemplated that eventuality by providing for subdivision [(g)]. The fact of their inability or unwillingness to care for the child I don't think rises to the level of establishing that substantial risk of serious physical harm."

The trial court disagreed, struck the allegations regarding sexual abuse, and found jurisdiction under section 300, subdivisions (b) and (g). It declared the child a dependent and ordered reunification services for the family.

Father moved for reconsideration, contending the court should have declared the child a ward of the court under section 601 rather than a dependent under section 300, subdivisions (b) and (g) because "[t]he child refuses to obey the lawful orders of her parents and is beyond their control." The court denied the motion.

DISCUSSION

1. Appellate Jurisdiction

Father purports to appeal from both the court's jurisdictional order and its order denying his motion for reconsideration. But he does not address the threshold issue of whether the latter is an appealable order. Because the issue goes to our appellate jurisdiction, we review it on our own motion. (*Olson v. Cory* (1983) 35 Cal.3d 390, 398; see Code Civ. Proc., § 904.1.) We conclude the appeal from the jurisdictional order was timely and thus need not decide whether the denial of the motion for reconsideration is separately appealable. (Cal. Rules of Court, rules 1.10, 5.585(f); § 395, subd. (a)(1), (2); see *Annette F. v. Sharon S.* (2005) 130 Cal.App.4th 1448, 1458-1459 [split of authority but prevailing view is order denying reconsideration motion not appealable].)

2. Jurisdictional Finding

Father argues substantial evidence does not support the court's jurisdictional findings under section 300, subdivisions (b) and (g), or alternatively the

allegations do not state a cause of action. Those subdivisions authorize the court to adjudge a child a dependent of the court where: "(b) The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of . . . her parent . . . to adequately supervise or protect the child . . .; [¶] . . . [¶] (g) The child has been left without any provision for support . . . ."

At the jurisdictional hearing, the court determines whether the child falls within any category in section 300. (*In re Michael D*. (1996) 51 Cal.App.4th 1074, 1082.) The petitioner "'must prove by a preponderance of the evidence that the child who is the subject of a petition comes under the juvenile court's jurisdiction.'" (*In re Shelley J*. (1998) 68 Cal.App.4th 322, 329.) We review the findings in the light most favorable to the order to see if substantial evidence supports them. (*Ibid*.)

Father contends the evidence was insufficient to sustain the finding under section 300, subdivision (g) because he "had done everything he could to provide support for [her]" but she ran away and refused to return home. The argument lacks merit.

The child may have been a chronic runaway, but father did not provide her a home to which she could return. He stated he did not want her back and that she belonged in foster care. He refused all family reunification services and made no effort to contact the child following her detention. Father does not dispute these facts. Moreover, at the jurisdictional hearing, his own counsel conceded father was unwilling to care for the child and that the case was properly plead under section 300, subdivision (g).

Substantial evidence supports the conclusion the child was a person described by section 300, subdivision (g). Thus, we need not decide whether substantial evidence also supports the finding of jurisdiction under subdivision (b). (*In re Athena P*. (2002) 103 Cal.App.4th 617, 630.)

3. Section 601

Father maintains that because there was no nexus between his conduct and the child's present risk, she did not fall within section 300 and should have been adjudicated a ward of the court under section 601. Preliminarily, we note father failed to carry his burden as the party moving for reconsideration on this basis. A motion for reconsideration must allege "new or different facts, circumstances or law" and demonstrate why, with reasonable diligence, the new evidence or authority could not have been produced earlier. (Code Civ. Proc., § 1008, subd. (b); *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1198, 1200.) Here, father relied on the "new or different" law of section 601. But because he offered no satisfactory explanation for not presenting that statute before or at the jurisdictional hearing, the court did not err in denying the motion for reconsideration. (*Baldwin v. Home Savings of America*, *supra*, 59 Cal.App.4th at p. 1200.)

Father's contention also fails on its merits. Section 601, subdivision (a), states, "Any person under the age of 18 years who persistently or habitually refuses to obey the reasonable and proper orders or directions of his or her parents, guardian, or custodian, or who is beyond the control of that person, or who is under the age of 18 years when he or she violated any ordinance of any city or county of this state establishing a curfew based solely on age is within the jurisdiction of the juvenile court which may adjudge the minor to be a ward of the court." According to father, section 601 applies because the child refused to obey her parents, was a chronic runaway, and engaged in criminal behavior.

We have already determined the court did not err in sustaining the dependency petition under section 300, subdivision (g). The only remaining question, therefore, is whether the court could have also found jurisdiction "under section 601 as being an alternative."

Sections 601 and 300 are not mutually exclusive. (*In re Bettye K.* (1991) 234 Cal.App.3d 143, 151.) As SSA notes, section 241.1 applies "[w]henever a minor appears to come within the description of both Section 300 and Section 601 or 602 . . . ." (§ 241.1, subd. (a).) In that event, the county probation and welfare departments must assess the minor to determine which status will serve his or her best interests and protect society. The departments' recommendations must be presented to the court for determination of the appropriate status for the minor. (§ 241.1, subd. (a).)

California Rules of Court, rule 5.512(a) (formerly rule 1403.5) defines the timeline for making a section 241.1 assessment. It states, "Whenever a child appears to come within the description of section 300 and either 601 or section 602, the responsible child welfare and probation departments must conduct a joint assessment to determine which status will serve the best interest of the child and the protection of society. [¶] (1) The assessment must be completed as soon as possible after the child comes to the attention of either department. [¶] (2) Whenever possible, the determination of status must be made before any petition concerning the child is filed. [¶] (3) The assessment report need not be prepared before the petition is filed but must be provided to the court for the hearing as stated in (e). [¶] (4) If a petition has been filed, on the request of the child, parent, guardian, or counsel, or on the court's own motion, the court may set a hearing for a determination under section 241.1 and order that the joint assessment report be made available as required in (f)."

Here, at the time the dependency petition was filed, the child did not "appear" to come within the description of both section 300 and section 601. As SSA notes, the child "had not committed an infraction[, or] been cited or charged with any crime at any time." Although the child "admitted she had engaged in the use of marijuana[] and . . . had an arrest in 2006 . . ., no criminal charges ever ensued and none were pending."

Moreover, the first time section 601 was raised as a possible basis for jurisdiction was in father's motion for reconsideration of the court's jurisdictional findings under section 300, subdivisions (b) and (g). Because the dependency petition had already been filed and sustained, father could have requested the court to set a hearing for a section 241.1 for determination and order the joint assessment report be prepared and made available. (Cal. Rules of Court, rule 5.512(a)(4).) But he did not do so, and even if he had the court was not required to grant his request or to set a hearing on its own motion. (*In re Marriage of Fini* (1994) 26 Cal.App.4th 1033, 1039 ["'It is a well established rule of statutory construction that the word "shall" connotes mandatory action and "may" connotes discretionary action'"].)

DISPOSITION

The orders are affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.